IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. Nos.10, 11, 14 & 15 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAM BUILDERS

Versus

UNION OF INDIA,OWNING & MINING WESTERN RLY.

Appearance:
MR GR MALHOTRA for petitioner
MR JAYANT PATEL with MR MUKESH A PATEL for Respondent

CORAM : MR.JUSTICE M.R.CALLA
Date of decision: 06/07/2001

COMMON ORAL JUDGEMENT

All these four petitions are identical on facts and involve the same questions and except the change of date of 21st Dec.1998 instead of 14th July 1998 in IAPP No.14 of 2001, there is no difference. Therefore, I propose to decide all these four petitions by this common order as under by referring to the facts in detail from IAPP No.10 of 2001.

The petitioner has come with the case that the petitioner's tender for the work of supply of machine crushed stone ballast in tracks along with Railway track

and in Station Yard from 663 kms. to 681 kms. between Railway Stations Umardashi to Chhapi in connection with Phulera - Marwar - Ahmedabad Guage conversion project was accepted by the Chief Project Manager (Construction), Western Railway, Ahmedabad by his letter dated 19th Dec.1994. This work was to be completed on or before 16th Sept.1995. However, this work was delayed. The petitioner alleges that it was delayed because of the fault of the respondent. Therefore, after the notices dated 13th April 1995 and 5th May 1995, the contract was finally rescinded on 24th May 1995. The petitioner himself has stated in no uncertain terms in para 7 of the petitions that, "That, the accounts are finally settled on 14.07.1998, but in that accounts the petitioner's......."

The petitioner has raised a grievance that despite the notice dated 1st Jan.2001 under Clause 64 of the general conditions of the Contract, the Arbitrator was not appointed. However, it appears that in fact the date of this notice is 27th Dec.2000. Clause 64 of the Contract with regard to the demand for arbitration is as under:

"64(1)(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case, save the excepted matter refer to in clause 63 of these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference to be referred arbitration.

(ii) The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

(iii) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims."

Mr.Patel, learned Counsel appearing on behalf of the respondent placing reliance on this very Clause 64 has submitted that in case of any dispute or difference if the Railway fails to make a decision within a reasonable time, then and in any such case, save and excepted matters referred to in Clause 63 of these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference to be referred to arbitration. He has further submitted that under Clause (iii) of 64, if the contractor does not prefer his specific and final claim in writing within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he will be deemed to have waived his claim and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims. Based on these terms as contained in Clause 64, Mr.Patel has submitted that after 14th July 1998, the petitioner did not take any steps and it was for the first time that as late as on 27th Dec.2000 the notice under Clause 64 seeking arbitration was sent. Mr.Patel has submitted that the demand for arbitration itself was beyond the period stipulated under Clause 64(iii) and therefore, these petitions for appointment of Arbitrator should not be entertained.

Mr.Malhotra has submitted that the final bill was never prepared and no intimation was given to him by the Railways. This answer on behalf of the petitioner cannot be accepted inasmuch as the petitioner himself has stated in para 7 of the application that the accounts were finally settled on 14th July 1998, he also does not dispute the receipt of the letter dated 14th July 1998, rather the same has been admitted in the notice dated 27th Dec.2000. It is, therefore, clear that the demand for arbitration had not been made within the time stipulated in Clause 64(iii) of the contract. Learned Counsel for the petitioner has placed reliance on a decision of the Andhra Pradesh High Court in the case of Meda Narsimhulu v. Council of Scientific & Industrial

Research, Delhi, reported in AIR 1999 Andhra Pradesh, 345 and the case of Wazir Chand v. Union of India, reported in AIR 1967 SC 990 referred therein. In this case, the question of limitation has been considered with regard to the claim itself. That is a stage after the appointment of Arbitrator. Therefore, in my opinion, this decision of Andhra Pradesh High Court and the decision in the case of Wazir Chand (supra) are of no avail to the petitioner in the facts of the present case. On facts, it is found that the demand has been raised beyond the period of 180 days as contemplated under Clause 64(iii). Even after going through para 11 of the judgment in the case of Meda Narsimhulu (supra) which has been heavily relied upon by the learned Counsel for the petitioner, I have not been able to persuade myself to agree that even the question as to whether the with regard to the demand seeking of arbitration was within time as per the contract or not cannot be gone into by this Court. In application under Sec.11, the Court has to consider as to whether the petitioner seeking arbitration is entitled for appointment of Arbitrator in accordance with the law read with the relevant terms of the contract or not and if it is found as a question of fact that demand seeking arbitration was itself beyond the period stipulated in the terms of contract, the Court may decline to entertain the petition under Sec.11 of the Act.

On behalf of the respondent, the decision in the case of Wild Life Institute of India v. Vijay Kumar Garg, reported in (1997) 10 SCC 528 has been cited. In that case before the Supreme Court, the arbitration clause provided that if the contractor fails to make the demand for arbitration in respect of any claim within a period of 90 days of receiving the intimation that the bill was ready, the claim of the contractor would be deemed to have been waived and absolutely barred and the principal-appellant shall be discharged and released from all the liabilities under the contract in respect of the claims. In case of discharge and release of all liabilities under the contract, the question of seeking arbitration simply does not arise.

In the facts of the present case, besides the petitioner's own averments as made in para 7 of the petitions that the accounts were finally settled on 14th July 1998, I find on the basis of the contents of the letter dated 14th July 1998 as enclosed as Annexure.G with the petitions by the petitioner itself that this was a sufficient intimation to the petitioner contractor so as to demand arbitration but the petitioner failed to do so within the period stipulated under Clause 64(iii) and

after 14th July 1998, the petitioner did not take any steps whatsoever till 27th Dec.2000 when the notice under Clause 64 was sent and by that time, the period of 90 days and 180 days and even after clubbing the period of 90 days and 180 days, i.e. 270 days had expired. In this view of the matter, this application filed before this Court under Sec.11 of the Arbitration and Conciliation Act, 1996 by the petitioner-contractor cannot be entertained.

There is no force in these petitions. All these four petitions are hereby rejected. The notice in each of these petitions is discharged.

6th July 2001 (M.R. Calla, J.)

Sreeram.